No. 556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

CITIES SERVICE GAS COMPANY, a corporation, *Petitioner,*

v.

FEDERAL POWER COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI; THE CITY OF KANSAS CITY, MISSOURI; STATE CORPORATION COMMISSION OF KANSAS; AND CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, *Respondents.*

On Petition for Rehearing on the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF MID-CONTINENT OIL & GAS ASSOCIATION AS AMICUS CURIAE ON PETITION FOR REHEARING ON RULING DENYING WRIT OF CERTIORARI.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The Mid-Continent Oil & Gas Association, by its Attorneys, moves this Honorable Court for leave to file, as amicus curiae, the accompanying brief on the petition for rehearing filed herein. The written consent of all the parties to this proceeding, with the single exception of the City of Kansas City, Missouri, which is not an original party hereto, have been obtained.

Respectfully submitted,

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BRIEF OF MID-CONTINENT OIL & GAS ASSOCIATION AS AMICUS CURIAE ON PETITION FOR REHEARING ON RULING DENYING WRIT OF CERTIORARI.

Mid-Continent Oil & Gas Association, as amicus curiae only, submits its brief to request this Court to grant to Cities Service Gas Company, petitioner for rehearing herein, a rehearing on the question of allowance of a writ of certiorari. Its reasons for so doing are clearly reflected by the points of law and fact actually involved in the instant case which portray the very substantial and adverse effect the failure to clarify the points involved by an au-

thoritative decision of this Court will have on this association and those it represents.

Mid-Continent Oil & Gas Association, with general headquarters at Tulsa, Oklahoma, is an oil and gas trade association with approximately 3,000 members, representing and serving all branches of the petroleum industry and related businesses, and in particular, a majority of the oil and gas producers in the States of Kansas, Oklahoma, Texas, New Mexico, Arkansas, Louisiana, Mississippi, and Alabama, in which area three-fourths of the nation's natural gas and over two-thirds of the nation's crude petroleum is produced. This association is not concerned with this rate case as such but is vitally and deeply interested in the questions necessarily arising out of and precipitated by the decision of the Tenth Circuit Court of Appeals, sought to be reviewed in this Court.

The concern of this association and the producers it represents is to secure a clarification of the decisions bearing upon the question of whether the first sale of a producer of gas to an interstate pipeline company subjects such producer to regulation by the Federal Power Commission and/or causes such producer to become a natural gas company under the Natural Gas Act. Since very often gas is produced as an inseparable part of the production of oil, the interest of this association is also for the determination of whether such first sale of gas produced with oil would subject the producer to such regulation by the Federal Power Commission and cause it to become a natural gas company.

In this case the producing and gathering facilities of the petitioner were placed in the rate base, and it was permitted to earn only a 6½ percent return on the depreciated "cost" of these facilities, which had the effect of requiring the petitioner practically to give away the gas it produced from leases covering some 68,000 acres of land in the Texas Panhandle. Thus, the Commission effectively determined what the petitioner could realize from its producing and gathering operations and regulated its production and gathering activities, despite the express provision to the contrary in

the Natural Gas Act. While this case does not involve the producer or gatherer who sells his gas in the field where produced to a natural gas company, and a denial of certiorari in this case would not necessarily authorize the Commission to assume that it could take jurisdiction over producers and gatherers who make field sales and deliveries to natural gas companies, nevertheless a decision by this Court holding that the Commission can have no jurisdiction over the producing and gathering activities of the petitioner would effectively stop the known efforts of the Commission to exercise jurisdiction over producers and gatherers who make field sales to natural gas companies and would save producers and gatherers much anxiety and unnecessary future litigation.

The Federal Power Commission, with approval of the Circuit Court, in this case has asserted and exercised jurisdiction over the production and gathering of natural gas notwithstanding the provisions of Section 1 (b) of the Natural Gas Act. Upon the question of the power or right of the Federal Power Commission to assert and exercise such jurisdiction, a majority of this Court has never affirmed the right. The Circuit Court apparently labored under the impression that this Court, in *Canadian River Gas Co.* v. *Federal Power Comm.*, 324 U. S. 581, 89 L. Ed. 1206, squarely and conclusively decided the jurisdiction of the Federal Power Commission over "production or gathering of natural gas," as it spoke of the decision as "the prevailing view." A careful examination and appraisal of the legal force and effect of the decision in the *Canadian River* case reflects there are three separate and distinct views expressed in the opinion, but no majority of this Court concurred that the Federal Power Commission had regulatory authority over the producing and gathering of natural gas. Justices Douglas, Black, Murphy and Rutledge, constituting a minority of the Court, announced the view erroneously described by the Court of Appeals as the "prevailing view." Justice Jackson announced a different view, and said:

"It is true that the Act excludes 'production or gathering of natural gas' from jurisdiction of the Commission. If the Commission had imposed any direct regulation upon that activity, I would join in holding it to have exceeded its jurisdiction. But the orders in question have no immediate 'impact' upon production or gathering of gas."

Justices Roberts, Reed and Frankfurter announced still a different view.

In *U. S.* v. *Pink,* 315 U. S. 203, 86 L. Ed. 797, the 3rd syllabus reads:

"An affirmance by an equally divided court, while conclusive on the parties, is not an authoritative precedent for other cases."

On page 810 of the Law Edition the Court said:

"* * * nor was our affirmance of the judgment in that case by an equally divided court an authoritative precedent. While it was conclusive and binding upon the parties as respects that controversy, the lack of agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases."

It therefore clearly appears that no authoritative decision confirming the jurisdiction of the Federal Power Commission over the production or gathering of natural gas has been made. Unless an authoritative decision of a majority of this Court be rendered upon this point there will continue to remain serious doubt and confusion as to the question, not only as an academic matter among lawyers but also in the minds and business determinations of thousands of oil and gas producers all over the nation. The fear on the part of the oil and gas industry that any first sale will entail the consequences above set out has been further increased and enlarged by the decisions of the United States Court of Appeals for the District of Columbia (*Peoples Natural Gas Co., et al.* v. *Federal Power Comm.,* 127 F. 2d 153, and *Interstate Natural Gas Co.* v. *Federal Power*

Comm., 156 F. 2d 949, decided by the Circuit Court of the Fifth Circuit, August 3, 1946).

The denial of a review of the Circuit Court's decision in the instant case will add further to the confusion existing in the industry, retard exploration and jeopardize the progress of the industry as a whole.

Those producers of oil and gas whom this association represents do not wish the price of natural gas artificially depressed by any regulation of the Federal Power Commission which allows the producer or gatherer of gas only an interest return on the depreciated so-called historical "cost" of reserves, producing properties and gathering facilities. They feel that price control thus exercised not only tends unjustly to depress the value of all gas in the field, but in most cases results in unjust discrimination among royalty owners and also among producers operating in the same field and acts as a deterrent to further exploration and development.

To hold that the price received by a producer and gatherer of gas sold to an interstate pipeline company may be regulated is to hold that the activity of producing and gathering, notwithstanding the plain language of the statute, is subject to the same regulation as a natural gas company. The jurisdiction to fix price is the power to regulate every activity with respect to the commodity sold. Therefore, to hold that the Commission may regulate the price which may be paid to the producer and gatherer of gas is to completely override the exemption expressly granted by the statute.

Section 1 (b) of the Act reads:

> "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas

or to the facilities used for such distribution or *to the production or gathering of natural gas.*"

By plain language Congress refused to confer upon the Federal Power Commission the right to regulate the production or the power to regulate the gathering of natural gas. Apparently it did not undertake to regulate the gathering of natural gas because it doubtless recognized that gathering was an incident to production—a purely local activity. Transportation and sale for resale within the meaning of the Act do not include production or gathering. The unambiguous intent of Congress was to exempt "production or gathering of natural gas" from the jurisdiction of the Federal Power Commission, and of necessity the language used clearly excludes production and gathering facilities and the necessary sale of gas by the producer and gatherer. Such a sale is clearly incidental to producing and gathering and, of necessity, is not within the jurisdiction of the Commission.

The vexatious effect upon the oil and gas industry of the fear of regulation by the Federal Power Commission being imposed upon its members who are producers to whom a first sale of gas is necessary to realize for them the fruits of production and gathering is multiplied by the apparent holding of the Federal Power Commission, with the approval of the Circuit Court, that it is required by Section 6 (a) of the Natural Gas Act to use the so-called "cost" formula exclusively where costs can be ascertained. This means that the price of gas depends on who produces it—a condition which inevitably destroys any orderly or stabilized field price for natural gas. In arriving at cost the Commission makes no adjustment for the decimated dollar devalued by joint resolution of Congress and proclamation of the President. Furthermore, no producer would explore or develop for the reward of earnings based upon cost. In the oil and gas business the lease that costs one dollar today might be worth a million dollars tomorrow, and it is that hope of reward which inspires producers to assume the

enormous financial risks involved in the exploration for and production of oil and gas. This Court has repeatedly held (*Natural Gas Pipe Line Co. of America* v. *Federal Power Comm.*, 315 U. S. 575, 86 Law Ed. 1073; *Hope Natural Gas Co.* v. *Federal Power Comm.*, 320 U. S. 591, 88 L. Ed. 333), that the Commission is not required to use any one formula or combination of formulae to arrive at the end results of "fair and reasonable" rates. This Court expressly refused to pass upon the questions in the case of *Canadian River Gas Co.* v. *Federal Power Comm.*, 324 U. S. 581, 89 L. Ed. 1206, of whether a determination of what is real "cost" and of whether, when cost is available, the Commission would be bound to ignore value and adopt this so-called "cost". A determination of the controlling rule of law in this regard is left entirely unsettled and undecided and a clarification of that situation is important to the industry this association represents.

The application of the Commission's so-called policy of restricted earnings for producing and gathering facilities based on the depreciated historical "cost" of such properties results in discouraging exploration and production, loads to gross discrimination as between producers and sellers in the same field and between fields, depresses the price of natural gas, denies natural gas companies subject to the jurisdiction of the Commission a reasonable return on the value of their producing properties, impresses the local activity of gathering and producing with a public utility status, and encourages waste of a valuable natural resource. If the situation be clarified by a decision in this case, the so-called atrocious waste in this industry would be eliminated or drastically reduced. If producers of oil and gas felt that the sale of this flared gas to a pipe line company would not subject them to prohibitively low prices for their product, they would feel justified in incurring the expense necessary to carry the gas from the wells or gasoline plants to the pipe lines and selling it to them for use in homes and industry in place of venting it into the air. The vast scale of these transactions renders the question in this

case of very great importance to the industry we represent, to the states, and to the people of this country.

There seems to be no practical avenue of relief for the producers whom this association represents directly accorded to them other than to assist, as far as possible, in the procurement of an actual judicial review, under Section 19 (b) of the Natural Gas Act, of a case in which the questions hereinbefore discussed are involved.

We therefore believe and are convinced (a) that a full decision on the questions presented in this case may remove the dire dilemma in which oil and gas producers find themselves without fault of their own; (b) that enormous waste of natural resources will continue if the present trend of decisions, caused we believe by a misconception of the decisions of this Court, is not clarified; and (c) that a refusal of this Court to grant a review in this case and decide the issues herein presented will in fact, if not in law, lend validity to the erroneous views of the Federal Power Commission and the Circuit Court of Appeals and contribute further in retarding development and exploration by producers.

The inseparability between production of gas and realization of the fruits thereof on first sale or use was by close and undistinguishable analogy declared in *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. Ed. 678, loc. cit. 685, by Chief Justice Marshall, as follows:

> "There is no difference, in effect, between a power to prohibit the sale of an article and the power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported *if none could be sold.*"

Therefore, it would seem that the law ought to be clarified to show that a producer, by first sale or first use of the gas, did not subject himself to regulation by the Federal Power Commission or become a natural gas company, and that a natural gas company as to production and gathering had a right to the fruits of such production and gather-

ing without regulation by said Commission, if upon full consideration the Court conceives that to be the law. It has well been said by this Court:

> "It is almost as important that the law should be settled permanently, as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil. Misera est servitus ubi jus est vagum aut incertum; Gilman v. City of Philadelphia, 3 Wall. 724, 18 L. Ed. 96, loc. cit. 99."

We agree with this time honored maxim and its method of use by this Court and that it is a legal, practical and colloquial truth that "it is a miserable slavery where the law is vague or uncertain."

Respectfully submitted,

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